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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB,

Petitioners

v.

VIRGINIA STATE BAR and FAIRFAX COUNTY BAR ASSOCIATION,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

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THE CITY OF NEW YORK
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Pursuant to Rule 42 of the Rules of this Court, the Association of the Bar of the City of New York respectfully moves this Court for leave to file the attached brief *amicus curiae* in this case. The consent of attorney for petitioners, Alan B. Morrison, Esq., and of the Office of the Attorney General of Virginia, attorney for respondent Virginia State Bar, has been obtained. However, attorneys for respondent Fairfax County Bar Association, Messrs. Hunton, Williams, Gay & Gibson, have indicated their opposition.

The interest of the Association of the Bar of the City of New York as *amicus curiae* is set forth at pages 1-2 of the attached brief.

Respectfully submitted,

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BRIEF FOR THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

The Interest of the *Amicus Curiae*

The Association of the Bar of the City of New York is a voluntary bar association having more than 10,000 members. The case before this Court raises issues that intimately concern the Association of the Bar; namely, the preservation of the highest professional standards, on the one hand, and an evenhanded enforcement of the antitrust laws, on the other. We believe that the antitrust laws should be enforced where appropriate against bar associations and against lawyers to the extent that such enforcement does not diminish the full execution of ethical and

professional obligations. On the record in this case, we submit, the prohibitions of the federal antitrust laws should be applied.

The Ruling Below and the Issue Presented (As Limited to the Claim of Attorney Immunity)

In connection with the purchase of a house in Reston, Virginia, located in Fairfax County, Lewis and Ruth Goldfarb were required to have a title search performed by a Virginia attorney. They actively sought the least expensive title-searching services available. However, they were unable to obtain a title search for less than $500, because the Fairfax County Bar Association had adopted a minimum fee schedule providing for such a minimum fee,[1] and Virginia State Bar opinions declared it unethical for attorneys habitually to charge fees below the stated minimum.

The Goldfarbs sued for violation of Section 1 of the Sherman Act. (26 Stat. 209, as amended, 15 U.S.C. §1.) The district court held that the minimum fee schedule in suit had the purpose of fixing a floor for professional fees; that it was a price-fixing agreement; that attorneys are engaged in "trade" within the meaning of the Sherman Act, and that the Fairfax County Bar Association's minimum fee schedule was illegal under Section 1. 355 F. Supp. 491 (E.D. Va. 1973).

The Court of Appeals for the Fourth Circuit reversed. Recognizing that the schedule operated as a "substantial restraint upon competition," it nonetheless held that lawyers fall within a "learned profession" exemption and are therefore immune from Sherman Act violations "where

1 The schedule states the minimum fee in terms of a percentage of the value of the property to be purchased.

the restraint is upon the learned profession itself." 497 F.2d 1, 15 (4th Cir. 1974).

The question to which this brief is addressed is: Are attorneys immune from the price-fixing prohibitions of Section 1 of the Sherman Act?

We answer: Attorneys are not so immune, and they should not be.

Summary of Argument

Attorneys are enjoined to uphold the highest ethical standards. They have duties to the public and to the courts. They are subject to sanctions for violation of the high standards of professional conduct.

The federal antitrust laws prohibit unreasonable restraints on trade or commerce. Among the most egregious of these restraints are agreements that fix, manipulate or stabilize price. In this case, a bar association minimum fee schedule was the instrument for fixing minimum prices. The antitrust laws would clearly invalidate price-fixing by attorneys affecting interstate commerce unless attorneys are immune from these laws.

Immunity from the antitrust laws is not lightly implied. Yet it should clearly be implied if and to the extent that enforcement of the law would frustrate the ability of attorneys to carry out their ethical responsibilities. In this case, immunity should be implied only if the injunction of the antitrust laws against price-fixing and the injunction of the code of ethics to uphold the highest standards of professional conduct are in conflict. They are not at all in conflict. Therefore the antitrust laws should be enforced in this case.

We do not address ourselves to matters beyond the record in this case. We do not consider whether a bar association may fix maximum fees in order to make legal services available to low-income persons. Nor do we consider whether in some cases there may be differences in standards necessary to carry out ethical and professional obligations in rural areas as opposed to urban areas, or by integrated bars as opposed to voluntary bars. These are matters to be dealt with in the context of the facts, as found by the trier of facts in each case.

Argument

The issue presented here is one of the first impression. This Court has never before held that the legal profession or any other "learned" profession is exempt from antitrust proscriptions.[2] It has recognized in dictum that the antitrust laws may sometimes apply differently to the professions to assure that ethical standards are not compromised.[3] It has gone no further.

The statute alleged to have been violated is Section 1 of the Sherman Act. Section 1 of the Sherman Act prohibits all contracts, combinations and conspiracies that unreasonably restrain trade.[4] Some agreements are so pernicious that they violate Section 1 *per se*.[5] Price-fixing is among the most egregious of all such violations. It restrains competition and it deprives the consumer of the benefits of a free and fair price. So abhorrent is price-fixing to a com-

2 The Court of Appeals relied on dicta in *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427 (1932); *FTC* v. *Raladam Co.*, 283 U.S. 643 (1931), and *The* [*Schooner*] *Nymph*, 18 F. Cas. 509 (1833).

3 *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 336 (1952) (dictum).

4 *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911).

5 *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1 (1958).

petitive economy that it is illegal in itself, and it cannot be justified by good motives.[6]

A strong public policy underlies the Sherman Act. The Act is generally applicable to all classes of persons, and presumptions are made in favor of inclusion, not exclusion.[7] It is argued that the Sherman Act is not applicable to attorneys. If this is so, it may be so for one of two reasons: (1) attorneys may be engaged in a pursuit not in trade or commerce; if so, they are in a class not comprehended by the language of the statute; or (2) attorneys may be impliedly immune from the statutory proscriptions in whole or in part because of a collision of the jurisdictions of antitrust and professional ethics.

We analyze these alternative categories in this brief. As to the first, we find the concept of a "learned profession" exclusion based on the ground that learned professions are not trades both insupportable as a matter of statutory construction and not sufficiently flexible to allow for a proper balancing of competing interests. As to the second, we find concepts of implied immunity useful and workable. The concepts that have emerged in weighing the needs of regulated industries against the objectives of antitrust enforcement provide a framework for assessing the extent of repugnancy, if any, between ethical considerations and antitrust precepts. Finding no repugnancy in this case, we conclude that there should be no immunity.

(1) Are attorneys excluded from the Sherman Act on the ground that learned professions are not trades?

The Court of Appeals would exclude "learned professions" from the purview of the antitrust laws on the ground

6 *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 210 (1940).

7 *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 353-55 (1963); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357-61 (1963).

that the "learned professions" are not trades and that therefore a "restraint of trade or commerce" cannot result (497 F.2d at 13). To treat attorneys as thus insulated from trade and commerce is to ignore the realities of the business of being a lawyer. Lawyers render their services for profit and livelihood; and the public can be as equally damaged by excessive, price-fixed legal fees as by price-fixed fees of carpenters or plumbers.

Further, the concept of exclusion, as opposed to implied immunity, fails to confront directly the essential question: To what extent can antitrust and ethical considerations be advanced mutually and compatibly; and to what extent do they collide, requiring antitrust proscriptions to give way?[8]

(2) Are attorneys impliedly immune in whole or in part from the antitrust laws?

In proper cases, immunity from antitrust proscriptions may be implied. However, immunity is highly disfavored; it "is not lightly implied."[9] A potential conflict between a regulatory scheme and the antitrust laws is not sufficient to oust the jurisdiction of either.[10] Rather, as this Court ruled in *Silver* v. *New York Stock Exchange*:

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8 The question is confronted indirectly by an approach that would recognize an exclusion to the extent of "non-commercial" activities of the profession and that would bring only "commercial" activities within antitrust coverage. This distinction has merit, but may raise unnecessary semantic questions.

A distinction of this nature is suggested in *United States* v. *Oregon State Bar* (D. Ore. Nov. 22, 1974) (not yet published), which rejected a blanket learned-profession exemption and denied defendants' motion for summary judgment in a minimum-fee-schedule price-fixing case.

9 *California* v. *FPC*, 369 U.S. 482, 485 (1962).

10 *Silver* v. *New York Stock Exchange*, note 7 *supra*, 373 U.S. at 357 (1963):

> "Contrary to the conclusions reached by the courts below, the proper approach to this case, in our view, is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted."

> "Repeal [of the antitrust laws] is to be regarded as implied only if necessary to make the [regulatory rules] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." 373 U.S. at 357.

So, too, should repeal of the antitrust laws be limited in reconciling professional standards with antitrust objectives. Immunity should be granted only where necessary to accommodate ethical considerations. Indeed, where immunity is claimed on the ground of ethics, it is incumbent upon the courts to go beyond mere semantics to determine whether a real ethical standard is involved.

The need for such an inquiry emerges clearly here. The Virginia State Bar has labeled "unethical" the practice of charging lower than minimum fees. To the contrary, restraints against individual fee-determination would seem unethical, or, at the least, unprofessional. Because a bar association calls "unethical" a practice that may promote competition does not mean that it is necessarily so.

To be sure, the law should be, and it is, flexible enough to provide "breathing space" for professional standards where breathing space is truly needed.

In the *Stock Exchange* case, this Court said:

> "[U]nder the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the [conflicting scheme]." 373 U. S. at 360.

Attorneys, likewise, must be free to carry out fully their professional responsibilities. There may be occasions when the antitrust laws must be relaxed to accommodate

professional standards; but this is not such a case. On the facts in suit there is no incompatibility between antitrust and ethics. Attorneys in communities without minimum fee schedules can be fully as ethical and professional as attorneys in communities that have them.[12]

Price-fixing itself is unprofessional conduct. The New York Court of Appeals said in dictum in *Lincoln Rochester Trust Co.* v. *Freeman:*

> ". . . [C]oncerted conduct to produce as a primary purpose a certain minimum financial reward would be unprofessional . . . ." 34 N. Y. 2d at 11.[13]

The trial court herein said:

> "The Court has some question whether the adoption of a minimum fee schedule is itself 'professional'. . . . Certainly fee setting is the least 'learned' part of the profession." 355 F. Supp. 491, 495.

Given the unprofessional character of price-fixing, there would seem little more to debate. Yet it is argued that

12 See *Lincoln Rochester Trust Co.* v. *Freeman,* 34 N.Y.2d 1, 355 N.Y.S.2d 336, 311 N.E.2d 480 (1974), wherein the New York Court of Appeals, while stating that attorneys were not intended to be included within the New York State antitrust law, said:

> "It is interesting that neither respondent nor *amicus curiae* have, in their submissions, established need for the minimum fee schedule, or that similar needs have existed generally, or to explain why in other parts of the State the use of minimum fee schedules does not seem to be correlated with population, urbanization, or other social factors which might explain either the use or nonuse of minimum fee schedules. Quite unpersuasive would be the argument that fee schedules are an indirect way of discouraging solicitation. If fee schedules are otherwise objectionable then the methods are too indirect and too strong for an ill that is otherwise curable. . . ." 34 N.Y.2d at 11-12.

13 The court in *Lincoln Rochester Trust* said also:

> ". . . [Bar association minimum fee schedules] may violate professional standards if their purpose or effect would be to control the fee level for professional services, or would have the purpose or effect of preventing 'fee competition' in the rendering of legal services." 34 N.Y.2d at 6.

attorneys are different from tradespeople; they are professionals; they are held to the highest standards; they are subject to sanctions if they do not meet their professional obligations.

These observations seem to us to provide no reason why offending attorneys should be immune from antitrust penalties. They would seem to provide no reason why the public, if forced to pay inflated legal fees, should be deprived of the usual remedies against the offenders while contractors, plumbers and bricklayers who violate the same proscriptions are subject to the law. Merely because lawyers are enjoined by professional standards to refrain from doing a forbidden thing is not a reason why they should be free from the antitrust consequences of having done it. To the contrary, if persons not subject to codes of ethics are bound by the laws against price-fixing, then *a fortiori* a professional, whose conduct should be exemplary, should be bound. An exception for attorneys can only diminish the confidence of the public in the integrity of the legal profession. Lawyers are not, and they should not be, above the law.

Conclusion

It is respectfully submitted that, on the facts of this case, there is no attorney-exemption from the price-fixing prohibitions of the Sherman Act.

Respectfully submitted,

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